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Supreme Court of the United States

US BANK NATIONAL ASS'N ND; US BANK NATIONAL ASS'N; FIRSTPLUS HOME LOAN TRUST 1996-2; FIRSTPLUS HOME LOAN OWNER TRUSTS 1996-3, 1996-4, 1997-1, 1997-2, 1997-3, 1997-4, 1998-1, 1998-2, 1998-3, 1998-4, AND 1998-5; WILMINGTON TRUST CO.; GOLETA NATIONAL BANK; RESIDENTIAL FUNDING CO., LLC; SOVEREIGN BANK; HSBC FINANCIAL CORP., F/K/A HOUSEHOLD FINANCIAL CORP.,

Petitioners,

v.

DEANTHONY THOMAS, SUSAN JELINKE-THOMAS, STEVEN M. RICH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The Eighth Circuit held in this case that section 521 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDA), codified at 12 U.S.C. § 1831d, does not completely preempt respondents' claims that a California-chartered bank charged them origination and other fees in excess of the limits

imposed by Missouri law. That holding created a circuit conflict, as the court of appeals recognized. *See* Pet. App. 11a. The Eighth Circuit's erroneous conclusion, and the disuniformity it has created, are harmful to state-chartered banks and to the national economy, in which those banks play a key role. *See* Pet. 16-17; *see also* Amicus Br. for Am. Bankers Ass'n et al. 10-14. When faced with similar considerations in *Beneficial National Bank* v. *Anderson*, 539 U.S. 1 (2003), which involved the same issue as this case but in regard to national banks, the Court granted certiorari to resolve a 1-1 circuit conflict. The Court should take the same approach here.[1]

Respondents offer no valid basis to do otherwise. They do not defend the merits of the Eighth Circuit's interpretation of DIDA—ignoring petitioners' myriad challenges to that interpretation, *see* Pet. 17-24—nor do they address the importance of avoiding disuniformity in this context. Instead, respondents deny the exis-

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[1] *Anderson* is not the only case in which this Court has granted review promptly to address issues implicating the need for uniform interpretation of federal banking law. *See Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 739 & n.2 (1996); *Marquette Nat'l Bank of Minneapolis* v. *First of Omaha Serv. Corp.*, 439 U.S. 299, 307 & n.17 (1978). Indeed, in *Household Credit Services, Inc.* v. *Pfennig*, 541 U.S. 232 (2004), the Court granted certiorari despite the absence of a clear circuit conflict, after the Solicitor General's invitation brief explained the need for "clear and uniform national standards for nationwide creditors," the threat the Sixth Circuit's decision in that case posed to such uniformity, and the fact that that decision departed from this Court's precedent, which is analogous to the Eighth Circuit's departure here from *Smiley* and *Anderson*. *See* Brief for United States as Amicus Curiae 7, 10-11, *Pfennig*, No. 02-857 (May 30, 2003), *available at* 2003 U.S. S. Ct. Briefs LEXIS 1251, **14, **18-20.

tence of the circuit conflict and posit the presence of vehicle problems. Neither assertion has merit.

I. THERE ARE NO VEHICLE PROBLEMS

Respondents contend (Opp. 5-6) that this case is not a good vehicle to decide the first question presented because the Eighth Circuit made a threshold ruling that DIDA does not apply on the facts here. But it is that very ruling that created the circuit conflict, and thus the need for this Court's review. The Eighth Circuit held that because of the "if" clauses in § 1831d, DIDA has no application to respondents' state-law usury claims, *see* Pet. App. 7a (referring to "limited nature of [DIDA]'s preemptive effect"); *id.* at 8a (similar)—even though under *Anderson* identical usury claims based on loans by a national bank would have been completely preempted by the National Bank Act (NBA), *see* 539 U.S. at 9-11, and even though Congress's express goal in adopting § 1831d was to give state and national banks identical protection from state usury laws.[2] That holding by the Eighth Circuit conflicts with decisions from other circuits, which concluded that DIDA completely preempts all state-law usury claims against state-chartered banks. *See In re Community Bank of N. Va.*, 418 F.3d 277, 295 (3d Cir. 2005) (DIDA "completely preempts *any* state law attempting to limit the ... interest and fees a federally insured-state chartered bank can charge." (emphasis added)), *quoted in Discover Bank* v. *Vaden*, 489 F.3d 594, 605 (4th Cir. 2007), *rev'd on other grounds*, 129 S. Ct. 1262 (2009). Respondents cannot evade review of

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[2] Respondents' assertion that their claims are not usury claims is meritless. *See infra* pp.9-10.

the statutory ruling at the heart of this case, a ruling that is in no way "case-specific" (Opp. 5), simply by labeling it a threshold matter.

The Eighth Circuit was able to conclude that DIDA does not apply here, moreover, *only* by interpreting the term "interest" in § 1831d to mean periodic interest rates but not certain non-periodic fees, *see* Pet. App. 10a; *see also* Pet. 25 (citing Pet. 9-10)—an interpretation that plainly conflicts with *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996). Respondents advance several arguments in suggesting (Opp. 6-13) that this conflict with *Smiley* actually makes the case less suitable for review rather than more. Respondents repeatedly contend, for example, that petitioners are merely making a "factbound" challenge (Opp. 8) to the Eighth Circuit's ruling. That is incorrect. Petitioners' argument (Pet. 24-27) is that the Eighth Circuit's construction of a term in a federal statute is inconsistent with this Court's case law interpreting the same term. That is not a factbound issue but a quintessentially legal one (and, indeed, the basis for petitioners' second question presented). Respondents argue as though the court of appeals acknowledged the rule of *Smiley* but then concluded that the origination fees underlying respondents' claims were not "interest" under DIDA. That is manifestly not what occurred here. The court simply ignored *Smiley*. Far from being a reason to let the decision below stand, the Eighth Circuit's disregard for this Court's precedent underscores the need for certiorari—particularly given the close connection between the Eighth Circuit's erroneous interpretation of "interest" and its flawed complete-preemption ruling.

Respondents also assert (Opp. 6) that review should be denied because the Eighth Circuit did not

expressly address the definition of "interest" and because had it done so the result would not have changed. Both contentions are wrong. To begin with, contrary to respondents' claim (Opp. 1) that "this Court typically refrains from deciding issues not passed on by the court below," the Court has made clear that "[a]ny issue pressed *or* passed upon below" may be reviewed by certiorari. *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) (emphasis added) (internal quotation marks omitted); *see also, e.g., United States* v. *Williams*, 504 U.S. 36, 41 (1992) ("[T]his rule operates (as it is phrased) in the disjunctive."). Respondents' preferred approach would allow courts to immunize their decisions from review simply by declining to expressly address arguments presented to them. And even were the rule as respondents posit, the Eighth Circuit's opinion leaves no doubt that the court's analysis was indeed based on the infirm legal conclusion that "interest" in DIDA means only periodic rates. *See* Pet. App. 10a.

Respondents likewise err in contending that none of the fees on which their claims rest constitutes "interest" under DIDA, and hence the Eighth Circuit's ruling would have been the same even had the court explicitly addressed the definition of "interest" and followed *Smiley*. Respondents state (Opp. 9) that in initiating this action they "challenged only two categories of non-[periodic-]interest fees," finders' or brokers' fees and certain closing costs. But as petitioners showed (Pet. 9-10), respondents' state-court petition and their federal-court complaint both alleged that respondents were charged a 10% "origination fee" from which respondents sought relief. *See* Dkt. No. 1-3 ¶ 67 (state-court

petition); Dkt. No. 43, ¶¶ 67, 72 (amended complaint).[3] These allegations were incorporated by reference into respondents' actual claims, *see* Dkt. No. 1-3, ¶ 72; Dkt. No. 43, ¶ 75, where respondents alleged that the origination fees "were not allowed by and in excess of what fees are allowed by [Mo. Rev. Stat. §] 408.233.1(5)." Dkt. No 1-3, ¶ 84(a); Dkt. No. 43, ¶ 87(a). And that provision pertains *only* to origination fees. *See* Mo. Rev. Stat. § 408.233(1)(5) (allowing "[a] nonrefundable origination fee not to exceed five percent of the principal").[4] Respondents' contention that their claims do not involve origination fees is demonstrably wrong.[5]

Respondents' fallback position (Opp. 10, 11) is that the origination fees at issue here are not interest "because they compensated a third party." But neither respondents' state-court petition nor their federal-court complaint alleged that the origination fees were paid to third parties. That is unsurprising, because an origination fee is charged by the lender to process the loan application, i.e., as part of the extension of credit. *See Smiley*, 517 U.S. at 742 (charges "assessed for simply

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[3] All docket numbers cited pertain to case number 5:04-cv-06098-HFS (W.D. Mo.).

[4] The version of this provision applicable to some of respondents' loans limited origination fees to two percent of the principal but was otherwise identical to the current version.

[5] Respondents accuse petitioners of "urg[ing] this Court ... to 'look beyond' the plaintiffs' complaint" in determining what fees their claims involve. Opp. 11 (quoting Pet. 27). That is false. On the factual question of which fees underlie respondents' claims, petitioners cited only respondents' state-court petition and their federal-court complaint—the best sources. *See* Pet. 9, 10. Respondents, by contrast, repeatedly rely on the Eighth Circuit's opinion. *See* Opp. 2, 10, 11.

making the loan" constitute "interest"). Respondents' failure to allege in their state-court petition or federal-court complaint that the origination fees were paid to a third party confirms that those fees are "interest" under DIDA.[6]

Respondents alternatively assert (Opp. 7-8 & n.1) that the Eighth Circuit's departure from *Smiley* did not affect its decision because the comparison of state interest-rate limits required under DIDA involves, they say, combining limits on periodic rates with limits on other fees to produce a single maximum rate for each state. Because Missouri law imposed no limit on periodic rates for part of the relevant period, the argument continues, it is impossible for California's rate to have exceed Missouri's, no matter what Missouri's limits on non-periodic fees were. That assertion is without merit.

As an initial matter, respondents themselves recognize (Opp. 7) that the aggregation that they say is required often cannot be done. Missouri's origination-fee limit of five percent of the principal, for example, *see* Mo. Rev. Stat. § 408.233(1)(5), cannot meaningfully be combined with Missouri's pre-1998 periodic interest limit of 20.04 percent per year, *see id.* § 408.232(1). Although flat fees can be converted to periodic rates on particular loans, *see, e.g.*, *Smiley*, 517 U.S. at 741, such a

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[6] Respondents—who rightly acknowledge (Opp. 9) that the FDIC has adopted the same definition of "interest" under DIDA that the Office of the Comptroller of the Currency (OCC) has adopted for the NBA—notably ignore petitioners' argument (Pet. 26 n.9) that an origination fee is directly analogous to a line-of-credit opening fee, which the OCC has authoritatively deemed to be "interest."

conversion is impossible in the abstract, i.e., without a specific loan amount and duration. But that does not mean that such "interest" is to be ignored for purposes of DIDA or any other usury limit.

More fundamentally, respondents' argument would effectively eliminate the protection that Congress gave state banks in passing DIDA. DIDA prevents States from imposing their usury limits on other States' banks, by authorizing state banks to charge the maximum rates allowed by their home States to any lender. *See* 12 U.S.C. § 1831d(a). Under respondents' view, any State that (like Missouri) set no limit on periodic rates but did limit non-periodic "interest" charges could impose those limits on federally insured state-chartered banks (its own or other States'), because the periodic/non-periodic aggregation that respondents say is required would yield no limit. Similarly, a State that set a limit on periodic rates but not on non-periodic fees could impose that limit on federally insured state-chartered banks (its own or 'other States'). Again, that would all but erase the core protection Congress sought to give such banks in passing DIDA. The proper question under that statute is simply whether a State's usury laws would prevent a federally insured state bank from charging *any* type of "interest" (periodic or non-periodic) that is permitted for other lenders by the bank's home State. If so, then claims based on those laws are completely preempted. And that is the situation here, because respondents' claims are based on a Missouri law that limits origination fees (i.e., "interest") more strictly than California law does.[7]

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[7] Respondents do not dispute that California generally does not limit state banks' imposition of origination fees. But respon-

Finally, respondents attempt to distinguish *Anderson*, stating that there "the plaintiffs 'unquestionably and unambiguously' alleged usury violations." Opp. 1 (quoting *Anderson*, 539 U.S. at 11); *accord* Opp. 12-13. But the same is true here: As explained, *see supra* pp.5-6, respondents claimed that they were charged loan fees exceeding those allowed by Missouri law. That is "unquestionably and unambiguously" a usury claim. Respondents' repeated contrary contention (*e.g.*, Opp. 2, 12) could be correct only if "usury" were restricted to excessive periodic-rate charges. That is not the law. *See Smiley*, 517 U.S. at 745-746 (citing cases "holding that flat charges violated state usury laws"); *see also, e.g.*, *Affiliated Acceptance Corp.* v. *Boggs*, 917 S.W.2d 652, 658 (Mo. Ct. App. 1996) ("The Boggs also claim that the additional ... fees, including a ten percent origination fee, were usurious.").[8] The only difference in this regard between this case and *Anderson* is that respondents' pleadings consciously avoided using the word "usury." Respondents believe that suffices to defeat federal jurisdiction. *See, e.g.*, Opp. 13. They are

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dents assert (Opp. 8 n.1) that as an industrial loan corporation, FirstPlus was not authorized under California law to make the loans at issue here at any interest rate. True or not, that is irrelevant because under DIDA, FirstPlus could charge the maximum interest permitted by California law for any lender. *See* 12 U.S.C. § 1831d(a); 12 C.F.R. § 7.4001(b); *Marquette*, 439 U.S. at 314 & n.26 (citing *Tiffany* v. *National Bank of Mo.*, 85 U.S. (18 Wall.) 409, 413 (1874)); *"Most Favored Lender" Doctrine Applies To Insured State Banks*, FDIC Advisory Op. 81-3 (Feb. 3, 1981), *available at* http://www.fdic.gov/regulations/laws/rules/4000-730.html.

[8] That respondents have sought a refund of all interest charged on the relevant loans (*see* Pet. 9) further confirms that their claims are for usury.

mistaken. *See Rivet* v. *Regions Bank of La.*, 522 U.S. 470, 475 (1998) ("If a court concludes that a plaintiff has 'artfully pleaded' claims [so as to omit necessary federal questions], it may uphold removal[.]"). This case is thus just like *Anderson* in all pertinent respects. The Court should grant certiorari here, as it did there.

II. THE CIRCUIT CONFLICT IS CLEAR

Respondents next contend (Opp. 13-17) that the circuit conflict described in the petition does not actually exist. While certiorari would be warranted even if respondents were correct—given the clarity of the Eighth Circuit's error and the tension between its ruling and this Court's decision in *Anderson*—they are not correct.

According to respondents, the Eighth Circuit "did not decide the complete-preemption question," Opp. 14, instead holding only that DIDA "did not apply here," Opp. 13-14. As explained, however, *see supra* p.3, it is precisely that holding—that DIDA applies only in "limited circumstances," Pet. App. 10a—that created the circuit conflict. The Eighth Circuit itself recognized that its interpretation of § 1831 was creating such a conflict, observing that "other federal courts have interpreted the language of § 1831d differently." Pet. App. 11a. Respondents assert (Opp. 16) that petitioners quote this language "out of context," but they then go on to reiterate the same argument that petitioners made, namely that the Eighth Circuit's point was that other courts have disagreed with its view that the "if" clauses in § 1831 mean that not all state-law usury claims against state banks are completely preempted. That is the basis for the first question presented here.

As to the Fourth Circuit's decision in *Discover Bank* v. *Vaden*, respondents state first (Opp. 15) that there the complete-preemption question "was not a subject of disagreement among the parties." But no such "disagreement" is required to create a holding. In any event, the Fourth Circuit did not simply accept the parties' agreement, as respondents imply. As this Court noted, the court of appeals instead "[r]ecogniz[ed] that 'a party may not create jurisdiction by concession,'" and thus "conducted its own analysis of [§ 1831d], ultimately concluding that the provision completely preempted state law." *Vaden* v. *Discover Bank*, 129 S. Ct. 1262, 1269 (2009) (quoting *Discover Bank*, 489 F.3d at 604 n.10).

Respondents next contend (Opp. 16) that this Court's reversal on different grounds in *Vaden* vitiates the Fourth Circuit complete-preemption holding. But this Court made clear that the complete-preemption question was distinct from those it addressed, stating that it was "express[ing] no opinion" on "the question of [DIDA]'s preemptive force." 129 S. Ct. at 1269 n.4. Respondents cite no authority for their suggestion that this Court's decision in *Vaden* affects the Fourth Circuit's complete-preemption holding—and one court in that circuit has already deemed that holding "intact." *See West Virginia* v. *Cashcall, Inc.*, 605 F. Supp. 2d 781, 785 n.5 (S.D. W.Va. 2009) ("The [Supreme] Court did not ... address the question of complete preemption with respect to § [1831d]. Accordingly, the Fourth Circuit's holding on that issue remains intact[.]"); *see also Central Pines Land Co.* v. *United States*, 274 F.3d 881, 894 (5th Cir. 2001) ("[Our] decision in *Rogers* ... had been reversed by the Supreme Court on other grounds. Nevertheless, this Court [subsequently] held that the decision of the *Rogers* panel was still binding, because

the Supreme Court had not explicitly or implicitly overruled our panel opinion." (footnote omitted)).

Respondents also argue (Opp. 15) that the complete-preemption ruling in *In re Community Bank* was dictum because there were other bases for federal jurisdiction. But those bases pertained to different claims. *See* 418 F.3d at 298. The Third Circuit thus still had to decide whether the district court had original (rather than supplemental) jurisdiction over the claims removed under DIDA. And its resolution of that question, like the Fourth Circuit's decision in *Vaden*, has been regarded by courts as a holding. *See Discover Bank*, 489 F.3d at 605; *Bumpers* v. *Community Bank of N. Va.*, No. 03-cv-1380, 2008 WL 203343, at *3-*4 (W.D. Pa. Jan. 24, 2008).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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